8395

No. ~~8385~~

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Application of
GAVIN W. CRAIG
For a Writ of Habeas Corpus.

GAVIN W. CRAIG,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

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SUBJECT INDEX

CITATIONS AND AUTHORITIES

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Addenda to Appellant's Statement of the Case

In his "Statement of the Case" appellant omits some steps that were taken that we believe should be in the mind of this court on this hearing. The statement of the case by appellant is to be found at pages 3, 4, 5 and 6 of appellant's brief. There should be added to that statement the fact that after the trial of the action an appeal was taken from the judgment of the trial court, to this court. On that appeal the judgment of the lower court was affirmed. Thereafter a petition to the Supreme Court of the United States for a writ of certiorari to this court was filed in the Supreme Court. On a hearing of that

petition the petition was denied without prejudice to a renewal of the application at the proper time. Thereafter an application to this court for a rehearing was duly made and the court considered that application and denied it. Thereafter a petition to the Supreme Court for a writ of certiorari to this court was duly filed in the Supreme Court of the United States. On hearing of that matter by the Supreme Court the petition was denied.

Since all of the foregoing facts pertaining to the procedure heretofore in this case are matters of record in this court we do not cite the dates and records of the matter since this court takes judicial notice of all of those facts pertaining to the procedure in this case.

Appellant's Questions on This Appeal

Appellant at pages 6 and 7 of his brief states the questions that are here on this appeal presented. Those propositions are laid down in serial numbers from 1 to 7 and question 3 is divided into two subparagraphs, and question 7 is divided into two subparagraphs. The answer to said questions 1, 2, 3, 4 and 7 we submit should be no. Questions 5 and 6 we believe need not be answered at all inasmuch as under the conditions of this hearing those propositions are not material.

Appellant's Stated Issues on This Appeal

At the top of page 8 of appellant's brief appellant sets forth in three propositions the issues to be presented to this court on this appeal. Those questions, however, are comprehended within the questions finally placed before this court by appellant in his brief at page 10.

Propositions of Law on This Appeal

Under the heading of "Preliminary Questions" propositions of law Nos. 1, 2, 3 and 4 are laid down by appellant at page 9 of his brief. These propositions apparently constitute the foundation of his claim of right to be released from prison on this hearing. It may be stated here that each of these propositions except proposition No. 4 is sound law. If proposition No. 4 means that upon a collateral attack in which attack it is claimed that the judgment is void the court will examine the face of the record and determine whether or not the original court had jurisdiction of the subject matter of the action, we would accept the proposition as law. At pages 10 and 11 of his brief appellant specifies the two actual grounds upon which he here asserts his claimed rights. This is under the caption "Two Principal Grounds New."

New Grounds of Appellant's Claimed Right

Neither of these so-called "new" propositions is *first* presented on this hearing. The first of the two propositions appearing on page 10 of appellant's brief when reduced to simple language is a claim by appellant that the indictment does not state facts sufficient to constitute a public offense. That matter was fully presented on the appeal from the judgment in this case and expressly passed upon by this court. This court in that opinion determined that the indictment was good against a demurrer both general and special. (*Craig v. United States,* 81 Fed. (2d) 822. The matter was not lightly passed over by this court but was considered closely and defi-

nitely. (See pages 821 and 822, *Craig v. United States,* 81 Fed. (2d), *supra.*) In conclusion this court after stating that there were twenty-five assignments of error continued:

> "We have here discussed, however, only those assignments that are argued in the briefs. As to the others, we might well have felt at liberty to disregard the points thereby raised. See *Forno v. Coyle,* (C. C. A. 9) 75 Fed. (2d) 692, 695, and cases there cited. Nevertheless, *we have examined all the other assignments* and have found them to be without merit." (Italics ours.)
>
> *Craig v. United States, supra,* page 831.

This court in passing upon the sufficiency of the indictment against the demurrer both general and special, and which was overruled by the trial court, necessarily examined all of the allegations of the indictment. It seems clear that if the point raised in so-called "new" proposition 1 of the above has any effect for the purpose of this hearing it would necessarily direct itself to the total insufficiency of the indictment to state a public offense, and was therefore passed upon on the general demurrer in the trial court and in this court.

In This Indictment For Conspiracy to Obstruct the Administration of Justice Names of Officers intended to be Influenced Need Not be Stated.

We do not, of course, concede that the failure to name the particular officers in charge, even though that had been necessary in this indictment, would take away from the trial court the jurisdiction to enter the judgment

entered herein. We contend that such would not be the effect since the allegations of the indictment clearly show that it seeks to state a public offense against laws of the United States, of which the trial court had jurisdiction as will appear hereinafter. So long as that situation obtains this court is without jurisdiction to release the appellant on this habeas corpus proceeding.

Pleas in Bar and Abatement

The second "new" proposition of appellant was also fully considered on the original appeal from the judgment in this case and was determined against the appellant here. (*Craig v. United States, supra,* pages 818, 819 and 820.) This court concluded, after a thorough discussion of the matter:

> "We believe that the court below was correct in granting the appellee's motion to strike the plea in bar and the plea of once in jeopardy."
>
> *Craig v. United States, supra,* page 820.

On this second "new" proposition we deem the authority of the trial court and of this court supported by the authorities cited by this court, all-sufficient to meet any contention made by appellant in his brief, and to settle the law of this case on this point. The Supreme Court having denied certiorari with the opinion of this court before it will be deemed to have held that the determination by the trial court and this court of the proposition under discussion is not only *the law of this case, but is the law.*

Insufficiency of the Indictment

The law in Federal jurisdictions and in California seems to be settled as to the first proposition of appellant, the insufficiency of the indictment.

> "The only question before us is whether the Police Court had jurisdiction. A *habeas corpus* proceeding can not be made to perform the function of a writ of error and we are not concerned with the question *whether the information was sufficient* or whether the acts set forth in the agreed statement constituted a crime, that is to say, whether the court properly applied the law, if it be found that the *court had jurisdiction to try the issues and to render the judgment. Ex parte Kearney,* 7 Wheat. 38; *Ex parte Watkins,* 3 Pet. 193; *Ex parte Parks,* 93 U. S. 18; *Ex parte Yarbrough,* 110 U. S. 651; *In re Coy,* 127 U. S. 731; *Gonzales v. Cunningham,* 164 U. S. 612; *In re Eckart,* 166 U. S. 481; *Storti v. Massachusetts,* 183 U. S. 138; *Dimmick v. Tompkins,* 194 U. S. 540; *Hyde v. Shine,* 199 U. S. 62, 83; *Whitney v. Dick,* 202 U. S. 132, 136; *Kaizo v. Henry,* 211 U.S. 146, 148." (With the exception of the words "habeas corpus" the italics above are ours.)
>
> *In the Matter of Gregory,* 219 U. S. 210, 213.

> "It is the settled rule of this Court that *habeas corpus* calls in question only the jurisdiction of the court whose judgment is challenged. *Andrews v. Swarz,* 156 U. S. 272; *Bergemann v. Backer,* 157 U. S. 655; *In re Lennon,* 166 U. S. 548; *Felts v. Murphy,* 201 U. S. 123; *Valentine v. Mercer,* 201 U. S. 131; *Frank v. Mangum,* 237 U. S. 309."
>
> *Knewel v. Egan,* 268 U. S. 442, 445.

> "On habeas corpus the inquiry into the sufficiency of an indictment is limited We think the true rule is that, where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on habeas corpus."
>
> *Ex parte Ruef*, 150 Cal. 605, 89 Pac. 605.

It seems clear from the foregoing authorities that this first "new" proposition raised by appellant can avail him nothing. It is clear that the indictment here undertakes to charge a crime against a Federal law, to-wit, a violation of Section 88, Title 18, *U. S. C. A.*, and that the conspiracy charged is a conspiracy to commit the second offense stated in Section 241, Title 18, *U. S. C. A.* It is not contended by appellant, and such a contention would be futile, that either Section 88 or Section 241, of Title 18, *U. S. C. A.* is unconstitutional. Therefore, if the contention of appellant could be entertained, and if it could be held that the failure to name the officers whom the conspirators conspired to influence renders the indictment totally deficient, yet since the statutes are constitutional and the court has jurisdiction of that character of crime, such defect in the indictment can not be reached on habeas corpus.

It Was Not Essential to the Validity of the Indictment in This Case to Allege or State in the Indictment the Names of the Particular Officers Whom the Defendants Conspired to Influence.

The persons having charge of the prosecution of crimes in the District Courts of the United States are the Attorney General and his assistants and the United States Attorney for the district in which the case is pending and his assistants and any special assistants of either the Attorney General or the United States Attorney that may be appointed and designated to prosecute the particular case. The Attorney General and his assistants and the United States Attorney in each district and his assistants respectively fill offices created by law and are severally appointed pursuant to law.

Courts take judicial notice of matters of common knowledge, of constitutions and laws of the United States of America and of the respective states.

16 *C. J.* 520, Section 967, and cases there cited.

The courts also take judicial notice of the names and official signatures of their own officers and generally of the officers of other courts before it.

16 *C. J.* 526, Section 987, and cases there cited.

As a rule matters of which the court must and will take judicial notice need not be stated in an indictment.

31 *C. J.* 670, Section 191;
Hill v. U. S., 275 Fed. 187, *189;*
In the Matter of Dunn, 212 U. S. 374, *386.*

It is a matter both of law and of common knowledge that the prosecuting officers change from time to time, and that the Attorney General and the United States Attorney who first have control of a particular case may have that control transferred to another either by designation under the law by the proper authority or by resignation or expiration of the term of office of the original officers in control. It is also known that the court who controls the procedure in the case may be the judge before whom the case originally came or another judge or judges, all pursuant to lawful acts of proper officers. It is clear, therefore, that the conspirators would probably not know what particular officer they would necessarily seek to influence, and therefore the general description of the officers that they conspired to seek to influence as set out in the indictment is definite and certain. It would in short be such officer or officers of the government of the United States as should at the time contemplated by the conspirators be in control of the particular case. That would include the Attorney General and any assistant or assistants of his that might be assigned to the particular case at any time, and it would, of course, contemplate whatever United States Attorney or assistant United States Attorney would at the time for approach by the conspirators be in charge and control of the particular case. It is therefore submitted that the conspiracy is properly charged when it states the character of the officers who would be sought by the conspirators to be influenced to dismiss the Italo case, when the time arrived in the mind of the conspirators for the approach, because since the statute fixes the duties of the

officers, and since the conduct and control of the Italo case was, under the statutes (Sections 481 to 488, Title 28, *U. S. C. A.*), in the hands of the United States Attorney for the Southern District of California and his assistants, subject to control by the Attorney General of the United States and his assistants, the conspiracy as charged was clearly to influence those officers regardless of the names of the persons who happened at any particular time to occupy those offices. As the allegations stand in the indictment it is clear that the intention of the conspirators was to obstruct justice by influencing any or all persons in the official position under the statute that gave them control of the Italo case. The conspirators no doubt were uninformed as to the name or names of the particular officers intended to be influenced, but intended to influence at such time as they should deem expedient whatever named persons occupied those official positions. They, in like manner as the courts, had knowledge of the existence of those official positions and likewise had knowledge that the officials having control of that case under the statutes might change from time to time. They contemplated according to the allegations of the indictment the obstruction of justice by influencing the officers, whoever they might be that had control of the Italo case. The allegations of the indictment are all sufficient to make it certain and to fully inform the defendants with certainty of the means that the conspirators intended to use for the purpose of consummating their crime of, not bribery of officers, but of *endeavoring to impede and obstruct justice.*

We believe that opposing counsel have confused the two crimes created by Section 241, Title 18, *U. S. C. A.*, the statute which the appellant here conspired with others to violate. The one crime created by that statute is the crime of corruptly or by threat or force endeavoring to influence, intimidate or impede any witness or officer or grand or petit juror in the discharge of his duties. That crime, of course, is specific and in order to charge that crime it would be necessary that the indictment allege the official capacity of the specific person sought to be thus impeded in the discharge of his duties. Where his name is known to the grand jurors the name, of course, should be given together with an allegation of the official position that he at the time of the alleged act of the defendant occupied. If his name is not known he should be otherwise described so as to make it certain what particular individual was sought to be impeded in the discharge of his duties as an officer. This is not necessary, however, in charging a conspiracy to impede or obstruct the administration of justice by those in whose hands that administration may be at the time of the attempted exercise of the influence. Officers in charge of the case to be influenced, as stated above, may be one set of persons one day and another set another day. They are, however, under the law existent officers at all times. If this indictment alleged the name of a particular officer and that particular officer died or resigned and thus went out of the lawful control of the Italo case, that would in such an event have terminated the conspiracy, but since it was the purpose of the conspirators to influence whatever person at any time during the life of the conspiracy

had charge and control of the Italo case it was not only proper to omit names, but, for certainty to the end of justice in the case, it was not necessary to allege that they conspired to influence a particular named person or particular named persons because the conspirators did not themselves thus limit the scope of their conspiracy. The conspiracy was therefore properly alleged to be a confederation for the purpose of endeavoring to impede and obstruct the administration of justice by influencing any officer of the United States by whatever name who should be in control of the Italo case during or within the life of the conspiracy in control of the Italo case. It was not necessary that the conspirators or any of them should know at the time of the inception of the conspiracy the name of a single member of the Department of Justice, or a single man in the office of the Attorney General of the United States or of the United States Attorney for the Southern District of California. They knew as a matter of law that some officer or officers of the United States would of necessity be in control of the Italo case. Those officers, whatever their names might be, were the ones that they conspired to influence as a means of endeavoring to obstruct justice in the Italo case.

It is not necessary, as stated above, in all cases that persons engaged in the commission of the substantive offenses, the first one created by Section 241, Title 18, *U. S. C. A.,* should know the name of the person that they seek to influence and impede. Where defendants were charged with corruptly endeavoring to influence and impede a petit juror in a certain cause the evidence did not show that the juror sought to be influenced bore

the name alleged in the indictment. The contention was made that such failure in the evidence was fatal to the verdict and judgment. The Eighth Circuit Court of Appeals held otherwise stating,

> "Neither the instructions of the court, nor the quoted allegation from the indictment, made knowledge of the name of the juror an ingredient of the offense. Certainly, it was not material whether his name be Bert Gander, John Doe, or Richard Roe. The statute contains no such refinement. The use of the name of the juror was for purpose of identifying him. Appellants contend that proof that they knew his name was essential to their guilt. According to the evidence of the government, defendants knew that the man they were attempting to corrupt was a juror, and the alleged fact that 'the name Gander, the man Gander, either as a juror or as a person, is literally absent from the record,' as charged in appellants' brief, is quite aside from any question at issue."
>
> *Bedell v. United States,* 78 Fed. (2d) 359, 368;
> *Williamson v. United States,* 207 U. S. 425, *449.*

It matters not whether the Attorney General and United States Attorney for the Southern District of California and the judges, who at various times respectively sat in the Craig case, were named Jones or Smith, whether they were all of the same surname or all bore different names, they were the Federal officials who had charge and control of the Italo case and they as such officers were known to the courts and all persons else including the appellant here to be officers, made such by statutory law of the United States of America, and to be

the persons in charge and control of the Italo case, and those are the persons that the appellant and his co-conspirators conspired to influence as a means of endeavoring to impede and obstruct justice in that case.

Counsel rely on a case heretofore decided by this court and quote from that case an excerpt which appears on page 13 of appellant's brief. That quotation is the rule and is in harmony with the decisions on the point generally. In that case this court recognized the rule that if a statute that undertakes to create a crime is unconstitutional the court has no jurisdiction of such a proposed crime simply because there is no such crime known to the law. Thus the rule quoted in counsel's brief is in no wise different from the situation where no statute has created such a crime as that charged in an indictment under review. In that case there was no such crime as using a deadly weapon in resisting an Indian agent who was making a search for spirituous liquors on the reservation. No statute ever having made that act a crime, and that being the act which was charged in the indictment as a crime, this court necessarily held that since there was no such statutory crime as that described in the indictment the court had no jurisdiction of the subject matter, there being no subject matter in such an indictment.

Mackey v. Miller, 126 Fed. 161, 162, 163.

The appellant relies strongly upon *Pettibone v. United States,* 148 U. S. 197. In that case the court found that there could be no conspiracy to violate an injunction unless the conspirators were charged with and proven to

have known of the existence of the injunction; also that there could be no conspiracy to obstruct the administration of justice in a case unless it was alleged and proven that the conspirators had knowledge of the pendency of the case.

Appellant quotes at page 25 of his brief from that case as follows:

> "The official character that creates the offense and the scienter is necessary."

That quotation is slightly misleading. The court in the opinion had referred to *United States v. Kee,* 39 Fed. 603, and *United States v. Keen,* 5 Mason 453, both being cases of substantive offense of seeking to influence a witness or impede an officer and then said:

> "In cases of that sort it is the official character that creates an offense and the scienter is necessary."

That is not quite in harmony with the part of the statement quoted. In those cases the substantive offense was charged. In this case the conspiracy is the offense charged and the means to be used involved the official character of the parties conspired to be influenced but the influencing of those officials is not the crime here charged. It is alleged in the indictment to inform the defendant as to the particular conspiracy that he was called upon to defend against. That allegation in connection with the time alleged in the indictment of the existence of the conspiracy, the fact that the Italo case was pending and was in charge of officers of the United States government, identified with certainty the conspiracy charged against

the appellant and his co-defendants and served to protect him against prosecution for the same offense at a later time.

We submit that this court and the Supreme Court of the United States have passed upon all of the questions here presented and that the rulings have been adverse to all of the contentions of the appellant here, and submit that the order and ruling of the court below should be by this court affirmed and the petition of the appellant denied.

Respectfully submitted,

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